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220-406—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1234

SAMUEL MONASTERSKY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1303

WILLIAM BENTVENA AND WILLIAM STRUZZIERI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 1234, App. A; Pet. No. 1303, p. 21; R. 51a)[1] is reported at 357 F. 2d 58.

[1] "R." refers to the appendix to appellants' brief in the court below, which has been filed in this Court with the petition in No. 1234. "Tr." refers to the transcript of the trial proceedings.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1966 (Pet. No. 1234, App. B; R. 61a). On March 17, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari in No. 1234 to April 23, 1966, and the petition in that case was filed on April 19. In No. 1303, a petition for rehearing in the court of appeals was denied on March 14, 1966 (R. 76a, 78a); on April 13, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 13, 1966; and the petition was filed on May 12.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support the convictions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners Monastersky and Struzzieri were convicted under two counts, and petitioner Bentvena under one count, of an indictment charging narcotic offenses in violation of 21 U.S.C. 173 and 174.[2] Monastersky, as

[2] This was petitioners' third trial. The first trial, under an indictment that named petitioners and twenty-six other defendants, ended in a mistrial. The second trial resulted in the conviction of petitioners and ten others on two substantive counts and one of conspiracy. The court of appeals affirmed the convictions of nine of the defendants but reversed as to petitioners and one other. It held that the participation of these three defendants in the conspiracy had not been proved and

a multiple offender, was sentenced to imprisonment for 15 years. Struzzieri and Bentvena were given 6-year terms. The Court of Appeals for the Second Circuit affirmed unanimously. 357 F. 2d 58.

The evidence showed that on January 5, 1959, Federal Narcotic Agent Giorgio, acting in an undercover capacity, was introduced to petitioner Monastersky in Manhattan by an informant. Monastersky invited Giorgio to a social club and asked how much narcotics he wanted, stating that he could supply any amount, that he did not sell less than "half-kilo lots," and that his price was $6000 for a half kilogram; and assuring Giorgio that the narcotics would be "100 per cent pure and untouched." When Giorgio indicated that he wanted a day or two to consider the matter, Monastersky gave him his telephone number and suggested that Giorgio call him the following day at 2:30 p.m. Giorgio did so and ordered one-half kilogram for $6000. Monastersky directed Giorgio to meet him at a designated spot at 10:15 that evening (Tr. 3–8, 160–161).

At about 8:40 p.m. surveilling agents saw Monastersky drive to and enter an apartment house at 525 East 88th Street. Several minutes later another car, driven by one Orlandino, arrived on the scene. Petitioner Struzzieri alighted from this car. He entered the apartment house, carrying a package wrapped in blue

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that the admission against them of evidence relating to the conspiracy had been prejudicial error, and remanded for a new trial on the substantive counts. *United States* v. *Bentvena*, 319 F. 2d 916, 947–956 (C.A. 2), certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940.

Christmas paper with a white snowman design, and shortly emerged empty-handed and drove away with Orlandino. Monastersky then left the apartment house and drove away (Tr. 162–164, 166–167, 258–263, 282). At about 9:30 p.m., one Richard McGovern left the same apartment house carrying a package similar to the one Struzzieri had taken into the premises. He walked, followed by agents, to 448 East 87th Street (Tr. 263).

Agent Giorgio met Monastersky that evening at the appointed place and Monastersky told the agent that his partner had the "stuff" and was waiting at an apartment on 87th Street. They went there and were admitted to an apartment where Monastersky introduced Giorgio to McGovern, who produced a package wrapped in blue Christmas paper with a snowman design. The agent opened the outer wrapper and removed a brown paper bag, which held a clear plastic bag containing a white powder subsequently found to be heroin. The three men left the apartment when Giorgio said that the purchase money was in his automobile. Outside the building, Giorgio removed $6000 from the trunk of a government car—where his ostensible "partner" (Agent Mangiaracina) waited—and handed the money to McGovern, who in turn handed Giorgio the package containing one-half kilogram of heroin (Tr. 8–17, 89–91, 169–171, 264–265).

Later that evening, surveilling agents followed Monastersky and McGovern back to the apartment house at 525 East 88th Street, and Struzzieri was seen entering the building with McGovern (Tr. 171–172).

Five minutes later Struzzieri left the building, entered an automobile with Orlandino and drove to a diner, where Orlandino was heard to say to him, "I hope this guy trusts Sammy with the money the next time" (Tr. 172–173, 175–176, 304–306).[3]

On January 13, 1959, Agent Giorgio telephoned Monastersky. Monastersky asked him whether he was satisfied with the merchandise and ready to negotiate further. Giorgio replied that he would like to purchase the same amount of heroin. Monastersky instructed Giorgio to meet him at 8:30 p.m. at a particular intersection. Giorgio complied. The two proceeded to 525 East 88th Street. There Monastersky pressed a buzzer for apartment 2–H, listed in the names of "Connors and McGovern". The apartment door was opened by McGovern. He conversed briefly with Monastersky. Monastersky then explained to Giorgio that the "junk" had not yet arrived and instructed that he meet him again at 9:30 in front of the building. The two separated (Tr. 23–27, 98–100, 177–178).

At 9:25 p.m., when Agent Giorgio was, as instructed, waiting in front of the apartment house on 88th Street, petitioners Struzzieri and Bentvena walked past him and entered the building. Five minutes later Monastersky emerged from the building and suggested that Giorgio join him in a walk. During the walk Monastersky asked about the purchase money, and the agent replied that his partner had

[3] There was also testimony that earlier the same evening Orlandino and Struzzieri were heard to converse about a "guy" who should pay on demand (Tr. 246–247).

the money. He called Agent Mangiaracina from a government vehicle parked nearby and, in the vestibule of the apartment house, introduced him to Monastersky as his partner "Joe". He instructed Mangiaracina to wait in the corridor with the money while he and Monastersky proceeded upstairs to apartment 2–H. As the two men entered the apartment, Bentvena and Struzzieri emerged from it (Tr. 27–29, 102, 314–317, 383–388). In the lobby, Agent Mangiaracina saw Bentvena and Struzzieri descend and noticed Bentvena approach the intercom system and press a buzzer. Mangiaracina heard the word "Connors" before the door closed (Tr. 104). At approximately the same moment Agent Giorgio in apartment 2–H observed McGovern answer the intercom and say, "Everything is O.K." (Tr. 43). Surveilling agents outside the building saw Bentvena and Struzzieri emerge and approach their parked car. Bentvena removed a brown package from the trunk of the car and, together with Struzzieri, re-entered the building, passed Agent Mangiaracina in the lobby, and proceeded upstairs (Tr. 105–106, 318, 388–390). At about the same time, Agent Giorgio in apartment 2–H heard the doorbell ring and saw McGovern answer it and return with a brown package containing a plastic bag of heroin. The agent inspected it and said he would take it. (Tr. 42–43.) Bentvena and Struzzieri meanwhile were observed leaving the building empty-handed (Tr. 106, 319, 390). Giorgio, asked by McGovern for the purchase money, summoned his "partner", Agent Mangiaracina, from the lobby.

They handed an envelope containing $6000 to Monastersky, Monastersky in turn delivered the package of heroin to Giorgio, and the agents departed (Tr. 46–47, 106–109). Subsequently Struzzieri and Bentvena were observed returning to this apartment house, where they remained for approximately one hour (Tr. 180, 320, 390).

ARGUMENT

1. Petitioners Bentvena and Struzzieri argue that the evidence against them was so weak that a verdict of acquittal should have been directed. We submit that there was sufficient evidence to support their conviction. The testimony of Agent Ward was unequivocal that on January 6 Struzzieri carried into an apartment house a package wrapped in blue Christmas paper with the imprint of a white snowman, and that McGovern emerged a short time later with a similar package, which he carried to the place where later that day Agent Giorgio purchased a package of heroin (Tr. 258–263, 282); Ward adhered to this description of the package throughout intensive cross-examination (including a defense-requested courtroom demonstration of distance and visibility, see Tr. 280–311), insisting that he had seen Struzzieri and the package clearly in a brightly lighted vestibule (see Tr. 261, 282, 290, 291, 308, 309). And agent Giorgio was positive that the package of heroin he purchased that day bore an outer wrapper of blue Christmas paper with the imprint of a snowman, over an inner cover consisting of a brown paper bag.[4]

[4] The only inconsistency in the description of the package resulted from the testimony of Agent Mangiaracina concerning

The testimony of several agents placed Bentvena and Struzzieri at the scene of the January 13 sale. Bentvena was seen carrying a brown paper package as he and Struzzieri entered the apartment house, where near the time of their entry such a package, containing heroin, was tendered at the door of a second floor apartment to McGovern. Moreover, Bentvena and Struzzieri had visited this apartment a few minutes earlier and had apparently been assured by McGovern, "Everything is O.K.". These facts alone, we submit, show actual possession of the narcotics by these defendants, sufficient to sustain their convictions.[5]

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the color of the package carried by Giorgio when the latter entered the government vehicle *after* the consummation of the sale. Somewhat confused as to whether the package then bore an outside wrapping of blue and white Christmas paper, or brown paper (see Tr. 94, 98, 134–139), Mangiaracina finally testified, contrary to Giorgio (Tr. 71–72, 157–159), that the outer wrapper was then brown (Tr. 139–141). In view of the fact that he had been shown both wrappings at the narcotics bureau (Tr. 94), and in view of the undisputed testimony of Giorgio that he unwrapped the package prior to entering the car where Mangiaracina waited, the discrepancy did not require a judgment of acquittal.

[5] The argument that Bentvena and Struzzieri were prejudiced by an "overflow of conspiracy 'hearsay' " (Pet. 12) has no merit. The transcript shows that the trial judge, bearing in mind the history of the case, cautioned government counsel to be careful to restrict his case to evidence pertaining to the substantive offenses charged (see Tr. 30–42). During the trial he repeatedly instructed the jury that evidence admissible only as against Monastersky was not to be considered with respect to Bentvena and Struzzieri (see Tr. 4, 35, 43, 46, 92, 102); he repeated such instructions in his final charge (Tr. 489).

2. Nor is there merit to the claim of petitioner Monastersky that this case evinces uncertainty on the part of the courts of appeals concerning the requirements of proving possession of narcotics. All agree that proof of actual physical possession is not required; that a showing of contructive possession is sufficient; and that the determining factor is whether the defendant had dominion and control of the drug.[6] Such dominion and control was proved here.

The record shows that it was Monastersky who on two occasions made the arrangements with the undercover agent Giorgio for the sale of the heroin. He made representations concerning the quality of the drug and the amount he could deliver, and set the date of delivery and the price without consulting anyone else. On both occasions, he was in the building where, and at the time when, his co-defendents de-

[6] *Brothers* v. *United States*, 328 F. 2d 151 (C.A. 9), certiorari denied, 377 U.S. 1001; *Bass* v. *United States*, 326 F. 2d 884 (C.A. 8), certiorari denied, 377 U.S. 905; *United States* v. *Carter*, 320 F. 2d 1 (C.A. 2); *Lucero* v. *United States*, 311 F. 2d 457 (C.A. 10), certiorari denied *sub nom. Maestas* v. *United States*, 372 U.S. 936; *United States* v. *Jones*, 308 F. 2d 26 (C.A. 2); *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9); *United States* v. *Malfi*, 264 F. 2d 147 (C.A. 3), certiorari denied, 361 U.S. 817; *United States* v. *Pisano*, 193 F. 2d 355 (C.A. 7). Petitioner concedes that there is no "direct" conflict between the various circuits on this issue (Pet. 10), and his citation of *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7), to show a latent conflict is wide of the mark. As later decisions have explained, that decision turned on the fact that "control [by the defendant] was expressly negatived" by undisputed proof that sole possession was in another. See *United States* v. *Davis*, 281 F. 2d 93, 100 (C.A. 7), reversed on other grounds, 364 U.S. 505; *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853; *Bass* v. *United States*, *supra*.

livered the heroin to his accomplice McGovern. On each occasion he steered Giorgio to McGovern, and throughout each sale he remained with McGovern. On one occasion he received the purchase price directly from Giorgio and, in turn, handed the heroin directly to him.

From these facts it was reasonable to infer that Monastersky was the primary promoter of the sales and had such control as enabled him without difficulty to procure the drug for a customer. See *United States* v. *Hernandez,* 290 F. 2d 86, 90 (C.A. 2). That is all the statute requires. Indeed, courts have found constructive possession in circumstances far less compelling than these. Cf. *Brothers* v. *United States,* 328 F. 2d 151 (C.A. 9), certiorari denied, 377 U.S. 1001. The intent of the statute would be defeated if liability could be avoided simply by refraining from actual physical contact with narcotics. See *Lucero* v. *United States,* 311 F. 2d 457 (C.A. 10), certiorari denied *sub nom. Maestas* v. *United States,* 372 U.S. 936.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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